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Introduction: The Foundations and Frontiers of Religious Liberty

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Abstract

This article introduces a symposium commemorating the 25th anniversary of the 1981 U.N. Declaration on Elimination of All Forms of Religious Intolerance and of Discrimination Based Upon Religion and Belief. The symposium was aimed at comparing religious liberty in Australia, Canada, Ireland, Israel, New Zealand, South Africa, and the United Kingdom, and addressed a range of questions regarding the subject. These countries were chosen as a topic of conversation because they share the same common law tradition, they share a deep devotion to religious liberty, and all seven ratified the U.N. Declaration. The U.N. concept of religious liberty underwent several changes from 1966 to 1992, and issues arose from the U.N. framework of religious liberty. One issue is the need to protect religious minorities, especially controversial groups. Likewise, limits on religious and anti-religious exercises that are offensive or harmful must be implemented. Both of these issues underscore the need to balance private and public expressions of religion. For the most part, all seven of these nations have handled these questions peacefully. They have had robust exchanges regarding these ideas and have strong democracies that have allowed them to withstand the challenges of implementing religious liberties. These countries

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serve as a model, not necessarily of how to implement religious liberty, but rather of how the process of securing religious liberty should be approached.

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The aim of this Symposium is to compare the foundations and frontiers of religious liberty in seven countries that share the common law tradition — Australia, Canada, Ireland, Israel, New Zealand, South Africa, and the United Kingdom. These countries, of course, use the common law in different ways, and in various combinations with other legal traditions. And many other countries could be added to such a comparative study: India, Pakistan, Bangladesh, Singapore, Malaysia, Japan, and several former British colonies in Asia, in Africa, and in the Pacific, Atlantic, and Caribbean all have enough common law kinship, if not commonwealth connections, to be worthy of further comparative study. But the seven countries analyzed in this Symposium provide a sturdy sample of legal cousins who have not only long shared a deep devotion to religious liberty, but who also now face unique challenges of how to protect the religious rights and liberties of all their citizens and subjects. While many specialists know the story of religious liberty within their own country, too few know the parallel religious liberty stories of other nations, even those within their same legal family. This collection of articles, freshly commissioned by ranking experts on religious liberty in each of the seven countries, will serve as a valuable comparative law resource.

Comparative legal analysis is always edifying—if for no other reason than to have confirmation, from a fresh perspective, of the validity and utility of one's own national legal norms and practices and to gain an idea or two about how to reform them. But this is an especially propitious time for comparative legal analysis of religious liberty norms. Each of these seven countries, among many others, are being severely challenged today by the rapid growth of religious pluralism born of globalization, religious conflict born of fundamentalism, even religious terrorism and warfare born of radicalization. Each country, in turn, has tinkered with a range of legal solutions in recent years – from aggressive new forms of political secularization and religious privatization to comprehensive new charters, cases, and statutes designed to address these new religious and cultural realities. Some of these new legal experiments are continuous with the traditional legal foundations of religious liberty in these seven countries; others are in tension with them. Some of these legal experiments are carefully synchronized with international religious liberty norms; others are deliberately set in tension with the same. The pages that follow map and measure these developments.

This symposium is part and product of the 25th anniversary celebration of the 1981 United Nations Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based Upon Religion and Belief (“the 1981 Declaration”).² The 1981 Declaration is one of the world’s most comprehensive statements of religious rights and liberties in the post-World War II era. While not a binding instrument, it provides an important gloss on the brief religious liberty provisions in the binding 1966 UN Covenant on Civil and Political Rights – an instrument which all seven countries studied herein have ratified without reservations, understandings, and declarations on these provisions.³ The 1981 Declaration also anticipates some of the fuller statements on more discrete religious rights and liberties set out in several subsequent international and regional instruments. Moreover, since 1986, the United Nations Special Rapporteur on Freedom of Religion or Belief has used this instrument to prepare an annual report on the state of religious liberty in the world that is published by the United Nations Commission on Human Rights. These annual reports -- based on worldwide surveys as well as the Special Rapporteur’s on-site visits to a few countries each year -- have made religious rights violations more transparent and have subjected rights violators to increased diplomatic pressures to reform.⁴ These official efforts have been enhanced by the effective reporting, in traditional and new electronic media, by non-governmental and news organizations devoted to enhancement and enforcement of the Declaration’s religious rights.⁵

The seven contributors to this Symposium have used the 1981 Declaration as something of a template by which to analyze the foundations and frontiers of religious liberty in their home countries. They have not followed the Declaration article-by-article in preparing their reports, nor have they ignored other important national, regional, and international instruments on point. But by using the 1981 Declaration as part in their analysis, the contributors have

² Adopted November 25, 1981, UN Doc. A/RES/36/55 (1982). These and the other documents cited herein are conventionally collected in *Religion and Human Rights: Basic Documents* (Tad Stahnke and J. Paul Martin eds. 1998) and excerpted in Natan Lerner, *Religion, Beliefs, and International Human Rights* 129-149 (2000).

³ See <http://www.ohchr.org/english/countries/ratification>.

⁴ See the description of this task by then Special Rapporteur, Abdelfattah Amor, “The Mandate of the UN Special Rapporteur,” 12 *Emory International Law Review* 945-950 (1998).

⁵ See, e.g., the news stories of Forum 18 (www://forum18.org/) and the Tandem Project (www://tandemproject.com). Also valuable have been the annual human rights reports to Congress of the United States Department of State, that have been supplemented since 1999 by the International Religious Freedom Report prepared by the U.S. Commission on International Religious Freedom (www://state.gov/drl/rls/irf/).

enhanced the methodological kinship and comparative value of these articles read together.

The seven contributors have also, in turn, used the legal experiences of religious liberty in their own countries as a foundation for criticizing and suggesting improvements to the 1981 Declaration. For all its initial promise, the 1981 Declaration has not emerged as a universal statement of religious freedom, nor has it moved toward a binding international Convention. The Declaration has been criticized for underplaying the rights of religious groups, for its heavily Western understandings of liberty of conscience and change of religion, for its underplaying of the roles of unusual rites and sites of religious practice and identity, for its simplistic understanding of the complex and diverse relationships between governmental and religious groups, for its preoccupation with religious rights within families and not other important social institutions, for its incomplete enumeration of religious rights, among other criticisms. The seven contributors have used the experience of religious liberty in their home countries to weigh these and other criticisms of the 1981 Declaration, and where apt to suggest amendments and emendations to it.

The International Framework of Religious Liberty⁶

Before taking the edifying seven-country tour offered in the pages that follow, it is worth pausing a moment to highlight the many essential religious liberty provisions that the 1981 Declaration and other international instruments do nicely capture. The 1981 Declaration is best read alongside four other major international instruments: (1) the International Covenant on Civil and Political Rights (1966) (“the 1966 Covenant”);⁷ (2) the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, which was promulgated in 1989 (“the 1989 Vienna Concluding Document”);⁸ (3) the 1989 UN Convention on the Rights of the Child (“the Child Convention”);⁹ and (4) the 1992 Declaration on the Rights of the Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities (“the 1992 Minorities Declaration”).¹⁰

⁶ This Section is adapted in part from John Witte, Jr., *Religion and the American Constitutional Experiment* 223-249 (2d ed., 2005) and John Witte, Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* 63-142 (2006).

⁷ UN Doc. A/6316 (1968).

⁸ 28 I.L.M. 527.

⁹ U.N. Doc. A/44/25.

¹⁰ Posted at <http://www.ohchr.org/english/law/minorities.htm>. (last visited April 26, 2007).

The 1966 International Covenant on Civil and Political Rights largely repeats the capacious guarantee of religious rights and liberties first announced in the 1948 Universal Declaration of Human Rights. Article 18 reads:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.¹¹

Article 18 distinguishes between the right to freedom of religion and the freedom to manifest one's religion -- what American law terms liberty of conscience and free exercise of religion respectively. The right to freedom of religion—the freedom to have, to alter, or to adopt a religion of one's choice—is an absolute right from which no derogation may be made and which may not be restricted or impaired in any manner. Freedom to manifest or exercise one's religion—individually or collectively, publicly or privately—may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The latter provision is an exhaustive list of the grounds allowed to limit the manifestation of religion. The requirement of necessity implies that any such limitation on the manifestation of religion must be proportionate to its aim to

¹¹ 1966 Covenant, *supra* note 7, art. 18.1-18.4.

protect any of the listed state interests. Such limitations must not be applied in a manner that would vitiate the rights guaranteed in Article 18 – an ideal, which a comprehensive recent study has shown, that is often honored in the breach.¹²

Article 20.2 of the 1966 Covenant calls for States Parties to prohibit “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.” Articles 2 and 26 further require equal treatment of all persons before the law and prohibit discrimination based, among other grounds, on religion.

The 1981 Declaration elaborates the religious liberty provisions that the 1966 Covenant adumbrated. Like the 1966 Covenant, the 1981 Declaration on its face applies to “everyone,” whether “individually or in community,” “in public or in private.”¹³ Articles 1 and 6 of the 1981 Declaration set forth a lengthy illustrative catalogue of rights to “freedom of thought, conscience, and religion” — repeating but also illustrating more concretely the 1966 Covenant’s guarantees of liberty of conscience and free exercise of religion. Article 6 enumerates these rights as follows:

- (a) To worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, to acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue, and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, to appoint, to elect, or to designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

¹² Symposium, “The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief,” 19 Emory International Law Review 465-1320 (2005).

¹³ 1981 Declaration, *supra* note 2, art. 1.1.

- (h) To observe days of rest and to celebrate holy days and ceremonies in accordance with the precepts of one's religion or belief; and
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.¹⁴

The 1981 Declaration also dwells specifically on the religious rights of children and their parents. It guarantees the rights of parents (or guardians) to organize life within their household and to educate their children "in accordance with their religion or beliefs."¹⁵ Such parental responsibility within and beyond the household, however, must be discharged in accordance with the "best interests of the child."¹⁶ At minimum, the parents' religious upbringing or education of their child "must not be injurious to his physical or mental health or to his full development."¹⁷ Moreover, the Declaration provides more generically, "the child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full conscience that his energy and talents should be devoted to the service of his fellow men."¹⁸ The Declaration leaves juxtaposed the parents' right to rear and educate their children in accordance with their own religion and beliefs and the state's power to protect the best interests of the child, including the lofty aspirations for the child's upbringing. Despite ample debate on point, the Declaration drafters offered no specific principles to resolve the disputes that would inevitably arise between the rights of parents and the powers of the state operating *in loco parentis*. Some further guidance on this subject is provided by the 1989 Child Convention -- though the issue of parental rights over their child's religious upbringing and welfare remains highly contested.¹⁹

As these children's rights provisions illustrate, the 1981 Declaration, like the 1966 Covenant, allows the "manifestation of religion" to be subjected to "appropriate" state regulation and adjudication. The 1981 Declaration permits states to enforce against religious individuals and institutions general regulations designed to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. It is assumed, however, that in all such instances,

¹⁴ Ibid., art. 6.

¹⁵ Ibid., art. 5.1.

¹⁶ Ibid., art. 5.2, 5.4.

¹⁷ Ibid., art. 5.5.

¹⁸ Ibid., art. 5.3.

¹⁹ See Symposium, "What's Wrong with Rights for Children?" 20 Emory International Law Review 1-239 (2006).

the grounds for such regulations are enumerated and explicit and that such regulations abide by the international legal principles of necessity and proportionality.²⁰

The 1981 Declaration includes more elaborate prohibitions than the 1966 Covenant on religious discrimination and intolerance. It bars religious “discrimination by any State, institution, group of persons, or person.”²¹ And it defines such discrimination as “any distinction, exclusion, restriction or preference based on religion or belief, and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights or fundamental freedoms on an equal basis.”²² All such discrimination based on religion or belief, the Declaration insists, is “an affront to human dignity” and a “disavowal” of the “fundamental freedoms” that form the cornerstone of national and international peace and cooperation.²³ Accordingly, the Declaration calls on all States Parties “to take effective measures to prevent and eliminate” such discrimination “in all fields of civil, economic, political, social, and cultural life,” including rescinding laws that foster discrimination and enacting laws that forbid it.²⁴

The 1981 Declaration includes suggested principles of implementation and application of these guarantees. It urges states to take all “effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.” It urges states to remove local laws that perpetuate or allow religious discrimination and to enact local criminal and civil laws to combat religious discrimination and intolerance.

The 1989 Vienna Concluding Document extends the religious liberty norms of the 1981 Declaration, particularly for religious groups. Principle 16 rounds out the list of enumerated rights guarantees quoted above from the 1981 Declaration:

16. In order to ensure the freedom of the individual to profess and practice religion or belief the participating States will, *inter alia*,

²⁰ 1981 Declaration, *supra* note 2, art. 1.3.

²¹ *Ibid.*, art. 2.1

²² *Ibid.*, art. 2.2.

²³ *Ibid.*, art. 3.

²⁴ *Ibid.*, art. 4.1-2.

- A. take effective measures to prevent and eliminate discrimination against individuals or communities, on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and ensure the effective equality between believers and non-believers;
- B. foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers;
- C. grant upon their request to communities of believers, practicing or prepared to practice their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries;
- D. respect the right of religious communities to establish and maintain freely accessible places of worship or assembly; organize themselves according to their own hierarchical and institutional structure; select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State; solicit and receive voluntary financial and other contributions;
- E. engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom;
- F. respect the right of everyone to give and receive religious education in the language of his choice, individually or in association with others;
- G. in this context respect, *inter alia*, the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions;
- H. allow the training of religious personnel in appropriate institutions;
- I. respect the right of individual believers and communities of believers to acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and materials related to the practice of religion or belief;
- J. allow religious faiths, institutions and organizations to produce and import and disseminate religious publications and materials;

K. favorably consider the interest of religious communities in participating in public dialogue, inter alia, through mass media.

A number of these religious group rights provisions in the Vienna Concluding Document reflect the international right to self-determination of peoples. This right has long been recognized as a basic norm of international law, and is included, among places, in the 1966 Covenant and in the 1989 Child Convention. It has its fullest expression in the 1992 Minorities Declaration. The right to self-determination belongs to “peoples” within plural societies. It affords a religious community to practice its religion, an ethnic community the right to promote its culture, and a linguistic community to speak its language without undue state interference or legal restrictions. Governments are required to secure the interests of distinct sections of the population that constitute a people in the above sense. The 1992 Minorities Declaration clearly spells out that obligation: protect and encourage conditions for the promotion of the concerned group identities of minorities; afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong; do not discriminate in any way against any person on the basis of his or her group identity; take actions to secure their equal treatment at law. The Minorities Declaration further provides that: “States shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.”²⁵ So conceived, the right to religious self-determination provides religious groups some of the same strong protections that are afforded to religious individuals under the freedom of conscience guarantee.

Each of the seven countries analyzed herein played critical roles in the development of a number of these international instruments. It is thus not surprising that these instruments highlight a number of the legal hotspots respecting individual and group religious rights featured on the tour that follows: How to protect religious minorities within a majoritarian religious culture -- particularly controversial groups like Muslims, Mormons, Jehovah’s Witnesses, Scientologists, and others who often bring charges of religious discrimination. How to place limits on religious and anti-religious exercises and expressions that cause offense or harm to others. How to adjudicate challenges that a state’s

²⁵ 1992 Minorities Declaration, *supra* note 10, art. 4.2. See thorough discussion in Johan D. van der Vyver, “The Right to Self Determination and its Enforcement, 10 *ILSA Journal of International and Comparative Law* 421-436 (2004); Johan D. van der Vyver, “Self Determination of the Peoples of Quebec Under International Law,” 10 *Journal of Transnational Law and Policy* 1-37 (2000).

proscriptions or prescriptions run directly counter to a party's core claims of conscience or cardinal commandments of the faith. How to balance private and public exercises of religion, including the liberty of conscience of one party to be left alone and the free exercise right of another to proselytize. How to negotiate the complex needs and norms of religious groups without according them too much sovereignty over their members. How to adjudicate intra- or interreligious disputes that come before secular courts for resolution. How to use and support religious officials and institutions in the delivery of vital social services. And many more such issues.

As the international human rights instruments would predict, religious sanctuaries, schools, and households have been the sites of the most frequent and urgent contests over religious liberty, and these hotspots have long occupied courts and legislatures. More recently, religiously-grounded institutions like charities, hospitals, and social service organizations have also raised trying religious liberty claims. Less predictable from the international instruments are the sharp conflicts that have emerged in most of these seven countries over issues of sex, marriage, and family life -- initially in fights about conception and abortion as well as polygamy, and more recently in fights over gay rights and same-sex unions or marriages and the role of religious communities in marriage formation and religious identification.

With notable exceptions on discrete issues, these seven countries have been able to handle their religious liberty issues peaceably, albeit with robust and sometimes deeply angry exchanges that have been culturally divisive. All seven countries now have healthy constitutional democracies in place, and their legislatures and courts have usually dealt systematically with religious liberty claims, albeit never to the satisfaction of all sides. The stories of religious liberty in these seven countries, viewed separately and together, provide valuable lessons for us all -- particularly for nations where religious conflicts trigger bloodshed and warfare, not lawsuits and statutes.